***The Honorable Marsha J. Pechman***

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| BEACON PLUMBING & MECHANICAL, INC.,<br><br>Plaintiff,<br><br>v.<br><br>SPOSARI INC. d/b/a/ MR. ROOTER PLUMBING SERVICES, MR. ROOTER LLC, THE DWYER GROUP, INC., THE DWYER GROUP LLC, and JOHN DOES 1-100,<br><br>Defendants. | **Case No. 2:15-cv-01613**<br><br>**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO PARTIAL MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF**<br><br>**NOTE ON MOTION CALENDAR: DECEMBER 18, 2015**<br><br>**ORAL ARGUMENT REQUESTED** |

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Defendants hereby reply to Plaintiff's Response to Defendants' Partial Motion to Dismiss ("Response" and "Motion"), and respectfully request that the Court dismiss the Fourth, Fifth, and Sixth claims for relief pursuant to Fed. R. Civ. P. 12(b)(6).[1]

Plaintiff's Response highlights the grounds for dismissing Plaintiff's statutory claims. First, Plaintiff's effort to revive its false advertising claim fails because no "literal falsity" presumption applies, because Plaintiff's allegations do not establish materiality, and because the "initial interest" theory does not apply to false advertising claims. Second, Plaintiff cites no authority to support its position that Defendants' domain name falls under the Anticybersquatting Consumer Protection Act. Finally, Plaintiff's Washington Consumer Protection Act ("WCPA") claim is not adequate as a matter of law because it does not sufficiently allege public interest impact by indicating how the alleged harm in this case may be repeated.

## ARGUMENT

### A. Plaintiff Cannot State A Federal False Advertising Claim Under 15 U.S.C. § 1125(a)(1)

Plaintiff's federal false advertising claim under 15 U.S.C. § 1125(a)(1)(B) does not meet required pleading standards. Plaintiff incorrectly asserts that the literal falsity of Defendants' advertisement creates a "presumption of consumer deception and materiality." Resp. at 3. Assuming arguendo that a single, unpublished district court opinion represents this Circuit's approach to "literal falsity,"[2] Plaintiff is not entitled to a presumption of materiality and

[1] Plaintiff's response states that it concedes dismissal of its federal trademark dilution claim.

[2] Defendants could find no other Circuit precedent that extends a literal-falsity presumption to both the materiality and consumer deception elements of a false advertising claim. The single case Plaintiff cites to support this proposition, *Soaring Helmet Corp. v. Nanal, Inc.*, No. C09-0789JLR, 2011 WL 39058, at *6 (W.D. Wash. Jan. 3, 2011), seemingly creates the presumption out of thin air and itself cites only two cases interpreting comparative false advertising claims (neither of which assert a literal-falsity presumption). *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (discussing literal falsity in the context of a comparative product superiority statement and making no reference to any presumption); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir. 1986) (evaluating a comparative product claim and not even mentioning literal falsity). No court has cited *Soaring Helmet Corp.* for its literal-falsity analysis, and this Court should not be the first.

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consumer deception because the alleged misrepresentations are not literally false. As Plaintiff concedes, the use of "Beacon" in the third-level domain name "beacon.callnow-plumber.com" was a valid and accurate address and cannot be literally false. *See Philbrick v. eNom, Inc.*, 593 F. Supp. 2d 352, 380 (D.N.H. 2009) ("On its face, the statement simply welcomes the viewer to a website named "Philbricksports.com," which, after all, is literally true in the sense that "philbricksports.com" is the name of the website. The statement may well suggest . . . that the site is affiliated with a business named 'Philbrick's Sports,' but claims that are implicit, attenuated, or merely suggestive usually cannot fairly be characterized as literally false." (quotations omitted)). Neither is the phrase "Call 24/7 Beacon Plumbing" a literal falsity, because (at most) it "deceptively represent[s] an association" between Plaintiff and Defendants. *See Paradise Canyon, LLC v. Integra Investments, LLC*, No. 207-CV-1701-RLH-GWF, 2008 WL 746919, at *3 (D. Nev. Mar. 18, 2008) (holding that language connecting housing division with neighboring golf course was not legally false in a technical sense because it was only a deceptive representation).

Second, Plaintiff's response does not resolve the fundamental problems it faces in alleging materiality. "Where a statement is not literally false and is only misleading in context . . . proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical." *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 (9th Cir.) supplemented sub nom. *William H. Morris Co. v. Grp. W. Inc.*, 67 F.3d 310 (9th Cir. 1995). Even assuming at the pleading stage that Defendants' inadvertent use of the word "Beacon" was misleading in context, Plaintiff does not satisfy the critical materiality component of its claim. No consumer could actually purchase plumbing services from Defendants without receiving clear notice from Mr. Rooter's clearly branded website about who was being hired. *See, e.g.*, *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) ("[R]easonable, prudent and experienced internet consumers are

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accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary. . . . This is sensible agnosticism, not consumer confusion." (internal citation omitted)).

Plaintiff's effort to recast its false advertising claim under the initial interest theory similarly fails. The initial interest theory relates to trademark infringement (a claim which Plaintiff voluntarily abandoned), not to false advertising. In trademark cases, courts recognize that an infringement action may still lie even if the element of "actual confusion" cannot be established because a consumer is only temporarily diverted. *See, e.g.*, *T-Mobile USA, Inc. v. Terry*, 862 F. Supp. 2d 1121, 1129 (W.D. Wash. 2012) (evaluating initial interest confusion only in the context of a trademark infringement claim, and not when discussing a false advertising claim); *Paradise Canyon*, LLC, 2008 WL at *3, 5 (D. Nev. Mar. 18, 2008) (same); *Playboy Enters v. Netscape Comuns. Corp.*, 354 F. 3d 1020, 1025–26 (9th Cir. 2004) (evaluating trademark infringement claim); *see also* Michael Grynberg, *The Road Not Taken: Initial Interest Confusion, Consumer Search Costs, and the Challenge of the Internet*, 28 Seattle U. L. Rev. 97, 144 (2004) ("But to whatever extent initial interest confusion evokes or resembles fraud or false advertising, it is neither."). This distinction makes sense. A trademark infringement claim contains no requirement that the confusion be material, so the initial interest theory would not conflict with that claim's elements. In contrast, the materiality element of a false advertising claim would be completely circumvented if the initial interest theory were adopted in that context. The initial interest theory does not salvage Plaintiff's false advertising claim.

Finally, Plaintiff's Response wrongly asserts that Defendants "implicitly acknowledge that the [false advertising] claim is well-pled under Rule 12(b)(6)" because they highlight Plaintiff's inability to meet the heightened pleading standard required under Rule 9(b). Resp. at 2. In Count Four of the Amended Complaint, Plaintiff fails to allege *in any form* that the

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purported misrepresentation would influence purchasing decisions. Even a perfunctory mention of materiality is conspicuously absent. Though Defendants remain confident that Ninth Circuit precedent supports application of Rule 9(b) in this case, Plaintiff's naked claim is insufficient under any standard.

**B. Plaintiff Cannot State an ACPA Claim**

As explained more fully in Defendants' Motion, Plaintiff also cannot state a claim under the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), because the domain featured in Plaintiff's Complaint is a "third-level domain" that does not fall within the ACPA's reach. *See GoForIt Ent't, LLC v. DigiMedia.com L.P.*, 750 F. Supp. 2d 712, 723 (N.D. Tex. 2010) (granting summary judgment in favor of defendant facing ACPA claims where the alleged violation occurred only on third-level domains).

**C. Plaintiff Cannot State a Claim Under the Washington Consumer Protection Act**

Plaintiff's Response fails to allege sufficient facts to support the "public interest impact" element of its WCPA claim, which Washington courts have refined to require a likelihood of repetition. Plaintiff attempts to focus on the possibility that certain factors listed in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 538 (1986) (*en banc*), may be present on the facts of this case. Notwithstanding the factors, "[h]owever the dispute arises, it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Stephens v. Omni Ins. Co.*, 138 Wash. App. 151, 178, 159 P.3d 10, 24 (2007) *aff'd sub nom. Panag v. Farmers Ins. Co. of Wash.*, 166 Wash. 2d 27, 204 P.3d 885 (2009) (quotation omitted). Though it may be true that a trademark violation can lead to public interest impact in certain cases involving specific facts, the case Plaintiff cites for this proposition explicitly noted it was "not deciding that trademark infringement necessarily establishes a violation, only that it can."

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*Seattle Endeavors, Inc. v. Mastro*, 868 P.2d 120, 127 (1994). Any overlap between trademark and WCPA claims has little impact on the baseline rule that requires a plaintiff to allege the harm is at risk of repetition. Plaintiff has not met this burden.

**CONCLUSION**

Plaintiff cannot state a claim under the Lanham Act, Anticybersquatting Consumer Protection Act, or Washington Consumer Protection Act. Plaintiff's Fourth, Fifth, and Sixth claims for relief should therefore be dismissed, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

DATED this 18th day of December, 2015.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2015, I electronically filed the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO PARTIAL MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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